2020 FOOD, BEVERAGE AND SUPPLEMENT LITIGATION ROUND-UP

BRYAN CAVE LEIGHTON PAISNER BLP

YEAR IN REVIEW

THE GLOBAL PANDEMIC, STAY AT HOME ORDERS, AND GOVERNMENT ISSUED LOCKDOWNS DID NOT STOP 2020 FROM BEING YET ANOTHER ACTIVE YEAR FOR NEW REGULATORY ACTIVITY AND LITIGATION TARGETING THE FOOD, BEVERAGE AND SUPPLEMENT INDUSTRIES.

In this round-up, Bryan Cave Leighton Paisner LLP presents a collection of regulatory developments, key court decisions, and notable settlements that were reached in 2020.

The highlights of this 2020 round-up include:

- New federal and state legislation governing food labeling, packaging, and taxation
- Litigation trends within the food industry
- COVID-19 related litigation and regulation
- An update on regulations and litigation regarding CBD-based products
- Slack fill litigation update
- Plant-based product litigation update
- Prop 65 and food safety update
- Notable rulings and settlements
- A preview of areas to watch in 2021

NEW FEDERAL LEGISLATION AND REGULATIONS

FDA Issues Finalized Rule on How Gluten-Free Fermented and Hydrolyzed Foods are Labeled

On August 12, 2020, the FDA issued a final rule, known as "Gluten-Free Labeling of Fermented or Hydrolyzed Foods," which established compliance requirements for fermented and hydrolyzed foods, or foods that contain fermented or hydrolyzed ingredients claiming to be "gluten-free." Some of the foods included in the rule are pickles, cheese, green olives, yogurt, sauerkraut, FDA-regulated beers and wines, and hydrolyzed plant proteins used to improve texture or flavor in processed foods.

The rule points to an inability to sufficiently detect and quantify through testing, gluten proteins in hydrolyzed and fermented foods no longer being intact. Therefore, the FDA will utilize records kept by the manufacturer demonstrating their foods to be gluten-free before fermentation or hydrolysis to determine compliance. The rule also includes a discussion of compliance for distilled foods.

It is also important to note that this rule does not change FDA's established definition of "gluten-free."

Taxpayer Certainty and Disaster Tax Relief Act of 2020 - Craft Beverage Modernization and Tax Reform Act (CBMA)

On December 27, 2020, the President signed the Taxpayer Certainty and Disaster Tax Act of 2020 which enacted provisions of the Craft Beverage Modernization Act ("CBMA").

This newly enacted legislation amends the tax treatment of certain alcoholic beverages by:

- Reducing tax rates on beer and distilled spirits, and certain tax credits for wine;
- Adjusting alcohol content for certain still wine tax classes from 14% to 16% alcohol by volume; and
- Lowering tax rates for certain meads and low alcohol wines.

Food Safety Modernization Act – Proposed Rule for Food Traceability

The FDA announced a proposed rule, "Requirements for Additional Traceability Records for Certain Foods" (Food Traceability Proposed Rule), on September 23, 2020, to formalize additional traceability recordkeeping requirements for those who manufacture, process, pack, or hold foods the Agency has designated for inclusion on the Food Traceability List ("FTL").

The proposed rule is descried to be a vital element in the FDA's New Era of Smarter Food Safety Blueprint and would prompt the implementation of Section 204(d) of the FDA Food Safety Modernization Act ("FSMA"). The additional requirements would assist the FDA in quickly preventing or mitigating foodborne illness outbreaks while also addressing other serious adverse health threats.

While the proposed requirements would only apply to those foods on the FTL, they were designed to be suitable for all FDA-regulated food products. The FDA would encourage the voluntary adoption of these practices industry wide. The FDA has announced public commenting periods which will run until February 22, 2021.

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Temporary Policy During the COVID-19 Public Health Emergency Regarding the Qualified Exemption from the Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption

On May 22, 2020, the FDA announced flexibility for the qualified exemption from the Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, due to disruptions to the supply chain.

This guidance recognized the adaptive ability farms have to shift sales to available buyers, thus helping reduce food shortages and boost the U.S. economy. In efforts to support farms in selling food to all available buyers during the COVID-19 public health emergency, the FDA does not intend to enforce the requirement in 21 CFR 112.5(a)(1) that a majority of sales be to qualified end-users for a farm to be eligible for the qualified exemption under the Produce Safety Rule.

This policy is intended to remain in effect only for the duration of the COVID-19 public health emergency, and the FDA intends to release additional guidance when the public health emergency concludes.

FDA Relaxes Labeling Requirements in Response to Pandemic

In response to the ongoing pandemic, the FDA temporarily relaxed a number of its labeling requirements concerning nutrition and supplement facts, foods for humans, shell eggs, menu requirements for chain restaurants and similar retail food establishments, and nutrition for certain packaged food.

Each of these policies is intended to remain in effect only for the duration of the public health emergency.

Nutrition and Supplement Facts Labels

On September 18, 2020, the FDA announced added flexibility for manufacturers who need to comply with the updated Nutrition and Supplement Facts label requirements by January 1, 2021. This flexibility applies to manufacturers with less than $10 million in annual food sales.

The compliance date will remain intact, yet the FDA will not focus on enforcement of the compliance date for these smaller manufacturers during 2021.

Also included in this flexibility are manufacturers of packages and containers of single-ingredient sugars, regardless of the size of the manufacturer.

Labeling Requirements for Foods for Humans

On May 22, 2020, the FDA released, "Temporary Policy Regarding Certain Food Labeling Requirements During the COVID-19 Public Health Emergency: Minor Formulation Changes and Vending Machines," a guidance allowing temporary flexibility in efforts to support the food supply chain while meeting consumer demand during the pandemic.

This guidance provides temporary flexibility to (1) manufacturers to make minor formulation changes in certain circumstances without making conforming label changes, and (2) the vending machine industry.

Packaging & Labeling of Shell Eggs Sold to Consumers by Retail Food Establishments

On April 3, 2020, the FDA released a guidance document, "Temporary Policy Regarding Packaging and Labeling of Shell Eggs Sold by Retail Food Establishments During the COVID-19 Public Health Emergency," to provide temporary flexibility to the packaging and labeling of shell eggs sold to consumers in retail food establishments.

This guidance is intended to encourage the continued distribution of shell eggs during the pandemic. The FDA does not intend to challenge the sale of shell eggs sold in cartons or flats without labels by retail food establishments provided they abide by the following:

- Display the following information clearly at the point of purchase: (1) statement of identity; (2) name and place of business of the manufacturer, packer, or distributor; and (3) safe handling instructions for shell eggs that have not been processed (such as by pasteurization) to destroy all Salmonella;
- Sell the shell eggs by the complete carton or flat; and
- Make no nutrition claims for the shell eggs.

Menu Labeling Requirements for Chain Restaurants and Similar Retail Food Establishments

On April 1, 2020, the FDA released, "Temporary Policy Regarding Nutrition Labeling of Standard Menu Items in Chain Restaurants and Similar Retail Food Establishments During the COVID-19 Public Health Emergency," to provide temporary flexibility to chain restaurants and similar retail food establishments currently required to provide nutrition information, including calories, on menus and menu boards.

Labeling of Packaged Food

On March 26, 2020, the FDA announced leniency to restaurants and food manufacturers selling certain packaged food. The FDA does not intend to object if the packaged food lacks a Nutrition Facts label, provided that the food does not have any nutrition claims and contains other required information on the label, such as:

- Statements of identity and ingredients;
- Name & place of the business of the food manufacturer, packer, or distributor;
- Net quantity of contents; and
- Allergen information required by the Food Allergen Labeling and Consumer Protection Act.

FDA Issued Final Guidance Regarding Use of an Alternate Name for Potassium Chloride in Food Labeling

On December 17, 2020, the FDA issued its final guidance titled, "Use of an Alternate Name for Potassium Chloride in Food Labeling," which provided food manufacturers guidance on its ongoing discretionary implementation for the name "potassium salt" in ingredient statements on food labels as a substitute to "potassium chloride" to better inform consumers that it is a salt substitute.

The final guidance is part of the FDA's Nutrition Innovation Strategy to reduce the burden of chronic disease in the United States through improved nutrition, by empowering consumers with information and supporting and fostering industry innovation to develop and promote healthier food options.

Potassium chloride, in some instances, can be used as a partial substitute for sodium chloride (referred to as "salt") in food processing and manufacturing. This enforcement discretion is meant to help decrease the sodium consumption of consumers by encouraging manufacturers to use potassium chloride as a substitute ingredient for some sodium chloride.

NEW STATE LEGISLATION – CALIFORNIA

Food Safety – Third-Party Food Delivery Platforms

On September 18, 2020, Governor Newsom signed legislation into law requiring ready-to-eat food delivered through a third-party food delivery platform to be transported in a manner in which the food is protected from contamination.

This newly enacted legislation also requires all bags or containers in which ready-to-eat foods are being transported or delivered from a food facility to a customer through a third-party food delivery platform to be closed by the food facility with a tamper-evident method prior to the food deliverer taking possession of the food. The legislation authorizes enforcement officers to recover reasonable costs in enforcing those requirements.

Food transported as part of a charitable feeding program and food that is being donated to a food bank are exempt from the bag or container requirement.

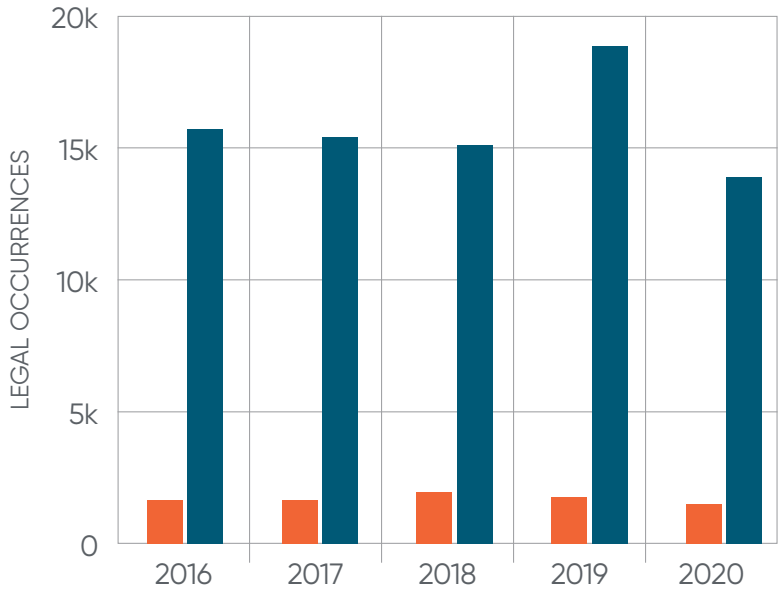
Fair Food Delivery Act of 2020

On September 24, 2020, the Fair Food Delivery Act of 2020 was signed into law by Governor Newsom. This law prohibits a food delivery platform from arranging for the delivery of an order from a food facility without first obtaining an agreement with the food facility expressly authorizing the food delivery platform to take orders and deliver meals prepared by the food facility.

It also defines a "food delivery platform" as an online business that acts as an intermediary between consumers and multiple food facilities to submit food orders from a consumer to a participating food facility, and to arrange for the delivery of the order from the food facility to the consumer.

STATISTICAL OVERVIEW

In 2020, approximately 80,000 new cases were filed in the food law space. While the number may sound large on its own, it is the lowest number of filings in the past five years.



	Dockets and Opinions	Occurrences	%
	Cases Filed (Dockets)	78,871	90.5%
	Cases Decided (Opinions)	8,293	9.5%

2021. Food & Agriculture Industry Report. Thomson Reuters, p.9

The top three jurisdictions for food law litigation were, in descending order: Wisconsin State Courts (appx. 9,700), California State Courts (7,900), and Federal Courts in California (6,200).

COVID-19 – GLOBAL PANDEMIC TRIGGERS PRICE GOUGING LITIGATION

Price Gouging Overview

Currently, there is no federal law establishing clear guidelines regarding price gouging, but many states have laws that limit or prohibit sellers from charging excessive prices for certain consumer products, which are triggered by the declaration of an emergency by federal, state, and/or local officials. In other states, actions are brought under general consumer protection statutes.

While most states prohibit price gouging, the laws vary greatly. Many states, such as Florida and Massachusetts, prohibit unconscionable price increases. Pennsylvania's Price Gouging Act, in contrast, makes it unlawful to charge an "unconscionably excessive" price for goods or services during a declared state of emergency and provides that it is prima facie evidence of an "unconscionably excessive" price when the price of a good/service is 20% higher than the average price of the same good/service in the seven days prior to the declared state of emergency. Other states, such as California and Oklahoma, define price gouging as a price increase of more than 10%. Senator Elizabeth Warren introduced federal legislation similar to California's price gouging laws, which would prohibit price increases of 10 percent or higher on essential consumer goods during an emergency.

Most of the states' statutes automatically go into effect upon the declaration of an emergency and apply to all goods and services. However, some states limit the application to specific products. For example, Indiana and Illinois price gouging laws apply only to fuel and petroleum, respectively. Georgia requires the governor to identify which items are protected from price gouging. Others, like California, only prohibit price gouging in connection with as-defined "essential" goods and services.

Several state price gouging statutes provide a complete defense where the seller can prove the price increase was directly attributable to its own rising costs of supply, labor, or materials.

Remedies for price gouging typically include injunctive relief, restitution orders, and civil penalties calculated per violation. Some statutes also permit disgorgement of profits earned and recovery of costs of litigation. Other states provide criminal penalties for willful acts of price gouging. For example, price gougers in Mississippi may be charged with a felony and imprisoned up to 5 years.

Recent Price Gouging Litigation

Throughout the past several months, state and nationwide class actions for price gouging have been filed against suppliers, distributors, retailers, and individuals selling essential products.

Not only have we seen an increase in filings and investigations, we have witnessed an expansion in the types of goods and services that are being included in price gouging lawsuits. Previously, goods and services were restricted to those that were considered "essential" such as medical supplies and groceries. However, recent litigation has not been so restricted. For example, a class action was recently filed against a restaurant group for purportedly charging a 10-15% service/packing fee despite no change in the quality or quantity of the food or packaging. Plaintiffs seek restitution, injunctive relief, attorneys' fees, and punitive damages. The outcome of this case could significantly impact price gouging litigation.

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THE PRICE OF EGGS HAS BEEN A CONTESTED ISSUE IN MANY JURISDICTIONS.

At the start of the pandemic, we saw an increase in the demand for several products, including eggs. The price of these products increased throughout the nation, leading to price gouging lawsuits and investigations in several jurisdictions. Both private litigants and attorneys general have brought suits, claiming the companies unconscionably increased the price of eggs.

In Texas, the Attorney General brought a suit against an egg producer, alleging it tripled the price of eggs even though it did not experience any supply issues or significant disruptions. The court was not convinced – the case was dismissed with prejudice in a short opinion. "This case really is about the State's unconstitutional rejection (and attempted manipulation) of the free market and existing contracts between sophisticated businesses."

A class action was brought in California against several egg farmers and grocery stores, alleging they increased the price of eggs over 10% during the emergency. After the defendants filed a motion to dismiss, pointing to several deficiencies in the complaint, the plaintiffs agreed to amend the complaint but missed the deadline to amend without court intervention. Subsequently, the plaintiffs voluntarily dismissed the lawsuit without prejudice.

Another egg producer was the subject of an investigation conducted by the Minnesota Attorney General. The producer cooperated with the investigation and agreed to limit its prices to no more than 20% over pre-emergency prices.

A case brought by the New York Attorney General has not had the same success in coming to a resolution. The suit alleges that an egg producer gained $4 million in illegal profits by charging up to four times the pre-pandemic price of eggs. The lawsuit seeks injunctive relief, civil penalties, and restitution.

DISINFECTANTS HAVE ALSO BEEN THE SUBJECT OF MANY PRICE GOUGING LAWSUITS.

In California, a pair of district attorneys brought price gouging claims against a grocery store chain. They alleged that the grocer illegally increased the price of hand sanitizers by more than 50% over the wholesale cost – "unconscionably excessive prices."

Without admitting liability, the grocery store paid over $140,000 in civil penalties and restitution. The grocery chain also agreed to ensure its prices comply with California laws and emergency orders.

In May 2020, the New York Attorney General initiated legal action against a wholesaler of Lysol disinfectant spray. The lawsuit alleged that the company illegally doubled the price of the products sold to neighborhood grocery stores at the start of the pandemic, even though the company did not incur increased costs. The Attorney General sought injunctive relief, restitution, disgorgement of profits, and civil penalties.

The Supreme Court of New York County dismissed the case, holding that the increased prices were not, as a matter of law, unconscionable. In reaching this conclusion, the court noted that the company did not uniformly increase its prices on the products and proved that its costs to purchase the products also increased. "[T]he pricing overall did not indicate any use of unfair leverage, an abuse of bargaining power or unconscionable means; nor did the pricing represent a gross disparity between the price of the goods and their value measured by the price at which they were sold immediately prior to March 7, 2020."

Several other cases, investigations, and fines have been brought against a multitude of retailers including large producers, pharmacies, and small retailers selling their products on third party vendors. The products involved in these disputes vary greatly – from masks, to patio heaters, to toilet papers. Consumers and enforcers in several jurisdictions are monitoring price increases and bringing suits. Third party vendors have reassured consumers they are proactively working against price gouging. One third party vendor said it has suspended tens of thousands of sellers for attempted price gouging.

FAST GROWING CBD MARKET CONTINUES TO CREATE REGULATORY CHALLENGES AND LITIGATION OPPORTUNITY

CBD and CBD-containing products are ubiquitous, yet there is significant misunderstanding about their legality. CBD is cannabidiol, one of more than a hundred different active compounds that can be derived from the hemp plant. The 2018 Farm Bill changed the legal status of hemp, separating it from the Schedule 1 substance known as "marihuana" under the Controlled Substances Act. The effect was to decriminalize the plant that meets the definition of hemp, as well as its derivatives. But, as the Food and Drug Administration (FDA) was quick to point out just hours after the President signed the bill, FDA's requirements relating to food, beverages, dietary supplements, cosmetics and other products regulated by the federal Food Drug and Cosmetic Act (FD&C Act) were not modified.

From a regulatory perspective, 2020 was "more of the same" from FDA. FDA continues to seek public input on the regulation of CBD, but has not taken any formal action regarding regulatory clearance for use as an ingredient in FDA-regulated products. FDA has, however, continued to issue Warning Letters companies making egregious claims or distributing contaminated product.

FDA issued 21 Warning Letters, more than half of which were focused on impermissible COVID-19 claims. Other claims included those relating to cancer, pain relief, arthritis, artery blockage, heart disease, immune disorders, diabetes/blood sugar control, stress and anxiety, ADHD, depression, and more, and FDA continues to assert that use of CBD in foods or beverages constitutes impermissible addition of a drug to such products, in violation of the FD&C Act. FDA considers company websites, social media posts (including retweets), marketing materials and more to assess the claims made by a company.

The Federal Trade Commission (FTC) dove deeper into the CBD marketing claims action this year as well. It too issued Warning Letters to companies marketing CBD to address COVID-19, and in December, announced the "first law enforcement crackdown on deceptive claims" in the CBD market, part of its initiative entitled "Operation CBDeceit." Six companies, each of which was making false and misleading health claims, were the target of FTC enforcement actions that resulted in, among other things, monetary penalties of up to $85,000 each.

One item to note in particular was that one of the Operation CBDeceit enforcement actions also involved claims relating to cannabigerol (CBG), a different cannabinoid compound derived from hemp. The market is starting to see an increasing number of claims relating to these other cannabinoids, and regulatory and litigation scrutiny of these other derivatives is not expected to be any different from CBD.

Of course, FDA and FTC Warning Letters and enforcement can be an invitation to private parties to initiate litigation. 2020 saw more than twenty new putative claims action claims filed against CBD companies in California, Florida, Illinois and Massachusetts, and substantive rulings in many of the cases filed toward the end of 2019. These cases center around consumer protection claims, alleging liability for actions such as selling product with less than the labeled CBD content, misleading the consumer about the legality of the product, and making false or misleading claims regarding the benefits of CBD.

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These claims are generally met with motions to dismiss that pursue preemption, primary jurisdiction or standing arguments. Primary jurisdiction has largely been the most successful of these, leading multiple courts to stay the litigation while FDA continues to pursue rulemaking. *See, e.g., Snyder v. Green Roads of Florida LLC*, Case No. 0:19-cv-62342 (S.D.Fla.). Multiple courts have noted that "FDA is under considerable pressure from Congress and the industry to expedite the publication of regulations and policy guidance regarding CBD products." *See, e.g., Colette et al v. CV Sciences, Inc.*, 2:19-cv-10227 (D.D.Cal.)(referencing Snyder). However, these primary jurisdiction arguments are not always successful, as one defendant in a Florida action discovered. In that case, the judge ruled that no matter the outcome of FDA rulemaking, it would not be expected to allow actual CBD content to differ from labeled CBD content, as the suit claimed. *See Potter v. PotNetwork Holdings Inc. et al.*, Case No 1:19-cv-24017 (S.D.Fla.). Nonetheless, we cannot expect stays to last indefinitely, especially if FDA is not seen as making any progress. The experience with proposed FDA rulemaking in the "naturals" space will likely serve as a good guide here.

2020 has reinforced a several things about the CBD (and other hemp derivatives) industry, including:

- companies involved in the CBD industry must carefully navigate the regulatory and litigation landscape;
- it's not just the brand owners who are the target of claims, but also raw material suppliers, manufacturers, distributors and retailers;
- ensure that your product contains what you say it contains and in the amount you say it contains; and
- perhaps most importantly, carefully scrutinize your claims, as false, misleading, or egregious claims present the quickest and most direct path to government scrutiny and class action claims.

SLACK FILL LITIGATION UPDATE

What is Slack Fill?

Slack fill lawsuits are typically putative class actions in which consumers allege a product's packaging is deceptive because it contains too much empty space, or nonfunctional slack fill, that disguises the amount of product in the package. While slack fill litigation has slowed in recent years, the courts continue to develop and refine this area of law.

Ninth Circuit considered whether a plaintiff can recover attorneys' fees when a defendant voluntarily changes its packaging during the course of the litigation.

GORDON V. TOOTSIE ROLL INDUS., INC., 810 F. APP'X 495 (9TH CIR. 2020)

After plaintiff filed a lawsuit alleging that opaque Junior Mints and Sugar Babies boxes contained slack fill, the defendant changed its labeling to add an "actual size" label under the candy image and a piece count. This prompted plaintiff to withdraw her motion for class certification and move for attorneys' fees under California Code of Civil Procedure § 1021.5, which allows fees to a "successful party in any action which has resulted in the enforcement of an important right affecting the public interest." Id. at 496. Plaintiff argued that, although the defendant's labeling change made her claims moot, her lawsuit was a "catalyst" for the changes and she was entitled to recover her fees. The district court denied the motion and plaintiff appealed.

The Ninth Circuit affirmed. Throughout the litigation, plaintiff claimed the size of the box was misleading and that defendant should either "fill the box with more candy to account for the size of the box or shrink the box to accurately represent the amount of the candy." Id. at 496-97. Plaintiff even alleged that "the majority of consumers don't even bother to look at any label information." Id. at 497. Thus, the Court determined that the labeling changes were not "the primary relief" sought in the case and affirmed the dismissal.

Second Circuit holds that past purchasers have no standing to seek injunctive relief - creates a split with Ninth Circuit.

BERNI V. BARILLA., S.P.A., 964 F.3D 141 (2D CIR. 2020)

In this case, a putative class of Barilla branded pasta alleged that the boxes of pasta they purchased in new packaging from Barilla were under-filled as compared with boxes of the same size that were previously sold by the company, thus deceiving consumers.

The parties eventually settled, with Barilla agreeing to pay damages to the named plaintiffs, and going forward, to include a minimum "fill line" on its boxes to indicate how much pasta was inside, in addition to clarifying language describing how its pasta is sold by weight and not by volume. Id. at 144.

Appellant, one of the class members and a past purchaser of Barilla pasta, appealed, arguing that the district court erred when it certified a Rule 23(b)(2) injunctive class in conjunction with approval of the settlement because a group of past purchasers is not entitled to injunctive relief.

The Second Circuit agreed and declared a bright line rule that past purchasers of product are not eligible for class certification under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The Court based its holding on the fact that the proposed relief did not benefit all class members. Specifically, the relief did not benefit past purchasers of the product who were "not likely to encounter future harm of the kind that makes injunctive relief appropriate." Id. at 147. Past purchasers were not bound to purchase the product again. Even if they did, past purchasers would not necessarily be harmed again because they had the very knowledge they complained they needed – information regarding the fill of the product. Id.

Because there is no likelihood of future harm, the Second Circuit found that "courts cannot permit injunctive relief through class settlement when plaintiffs would otherwise lack standing to seek relief under Article III." Id.

PLANT-BASED PRODUCTS

Last year we focused on the ongoing litigation related to state statues heightening standards for permissible labels on plant-based products or "fake meat." Five states have seen litigation regarding statutes that focus on limiting the language of plant-based products as meat. Turtle Island Foods, also known as Tofurky Co., continues to pursue litigation in three states: Missouri, Arkansas, and Louisiana. Upton's Natural Co. has brought suit in Mississippi and Oklahoma. The Mississippi Department of Agriculture and Commerce worked with the plaintiffs to settle the case so long as the advertisement contains one of the following: meat free, meatless, plant-based, veggie-based, made from plants, vegetarian or vegan. The below analysis will address the status of each of the remaining actions.

TURTLE ISLAND FOODS, SPC, ET AL V. RICHARDSON, CASE NO. 2:18-CV-04173

As we mentioned last year, this action initiated in the United States District Court for the Western District of Missouri brought by Tofurky, a vegan brand, and The Good Food Institute, a food advocacy group, challenges the constitutionality of the Missouri statute prohibiting false statements that confuse consumers related to meat substitutes. The Missouri law makes it unlawful to "misrepresent[] a product as meat derived from harvest production livestock or poultry." A producer that violates the statute could face up to one year in prison and a fine of $1,000.00.

After the Eighth Circuit denied plaintiffs request for permission to appeal, the stay was lifted in the Western District of Missouri and the parties were told to file a new amended order. The parties are engaged in ongoing discovery.

TURTLE ISLAND FOODS SPC V. SOMAN, CASE NO. 4:19-CV-00514

In 2019, the same plaintiffs initiated this action in Arkansas challenging the Arkansas statute that prohibits misbranding meat, rice, beef, or pork or utilizing a term that is the same or similar as one that has historically been used to define a specific agricultural product. At the end of 2019, the United States District Court for the District of Arkansas granted the motion for preliminary injunction due to Free Speech and First Amendment violations within the statute.

On December 15, 2020, the court granted the plaintiffs' motion to consolidate the preliminary injunction hearing with the trial on the merits. The court allowed the party to file an amended complaint addressing the additional relief sought within 45 days of the entry of the Order and granting the State time after that deadline to file a responsive supplemental brief.

TURTLE ISLAND FOODS SPC V. STRAIN, CASE NO. 3:20-CV-00674

Similar to the above-mentioned litigation, plaintiff challenges the Louisiana statute that went into effect on October 1, 2020 raising the same Frist Amendment and Due Process Clause issues as the earlier filed actions in other states. Under the Louisiana statute a producer may be fined $500 per day for violating the statute. On November 3, 2020, the State Department of Agriculture informed the Court that the State will not enforce the statute until the court resolves the constitutional issues raised in the action. The parties remain engaged in the early stages of litigation.

UPTON'S NATURALS CO. V. STITT, CASE NO. CIV-20-938-F

On September 16, 2020, plaintiffs Upton's Naturals Co. and The Plant Based Foods Association, filed a motion for preliminary injunction based on the same constitutional challenges of freedom of speech and due process issues to stop the enforcement of Oklahoma's statute prohibiting the advertisement of a product as meat that is not derived from harvested livestock. The statute includes an exception for plant-based products stating that so long as plant-based packaging displays that the product is derived from plant-based sources in a type that is the same size and prominence as the product name, it will not violate the statute. A violation of the Oklahoma statue may result in fines up to $10,000 per offense.

On November 19, 2020, the court denied plaintiffs' request for a preliminary injunction because the deception that may result in violating the plant-based sources exception is self-evident. The plaintiffs have appealed.

PROP 65 & FOOD SAFETY UPDATE

California Prop. 65 – The Year of Acrylamide

In the world of California Proposition 65, this was the year of acrylamide. The year saw a wave of enforcement actions alleging exposure to acrylamide – all in food products, since acrylamide is created by the process of cooking or heating certain foods. In 2020 alone, there were 435 60-day notices for acrylamide, many naming multiple defendants and products.

Since the threshold level of exposure for requiring a warning for acrylamide is so low, at just .2 micrograms per day, and has been controversial ever since the listing of acrylamide as a carcinogen under Prop. 65 in 1990, many food manufacturers and retailers found themselves unable to head off private enforcement actions or to comply with the plaintiffs' reformulation demands, resulting in warnings for acrylamide on everything from almonds, bread, cookies, and crackers to olives and prunes.

Regulatory Relief

In response, California's Office of Environmental Health Hazard (OEHHA), the agency that administers Prop. 65, offered a glimpse of possible future relief from the onslaught of 60-day notices and lawsuits. OEHHA released a proposed regulation providing that intake of listed chemicals formed by cooking or heat processing of foods would not represent an exposure if the concentration is reduced to the lowest level currently feasible. The proposed regulation would also establish lowest feasible levels for certain foods. Concentrations of acrylamide at or below these levels would not require a warning.

OEHHA proposes the following as the lowest feasible acrylamide levels for certain foods:

FOOD/FOOD GROUPS	MAXIMUM AVERAGE CONCENTRATION LEVEL (PPB)	MAXIMUM UNIT CONCENTRATION LEVEL (PPB)
Almonds, roasted, roasted almond butter, and chocolate-covered almonds	225	---
Bread, non-wheat-based products including loaves, rolls, buns, baguettes	100	---
Bread, wheat-based products including loaves, rolls, buns, baguettes	50	---
Cookies, animal and animal crackers (sweet)	75	100
Cookies, thin and crispy	281	300
Cookies, sandwich wafers	115	---
Crackers, savory, including crispbread	350	490
Potato products, French fried potatoes	280	400
Potato or sweet potato products, not otherwise specified, such as hash browns and potato puffs	350	490
Potato or sweet potato products, sliced chips	281	350
Prune juice, 100% (not from concentrate)	---	250
Prune juice, made with concentrate	---	150
Waffles	280	---

Currently, there are other regulatory exceptions from the warning requirement for exposures to naturally occurring chemicals in foods, an exemption from the carcinogen warning requirement for acrylamide in coffee, and for specific concentrations of naturally occurring arsenic in rice.

The proposed regulation has received significant public comments from manufacturers as well as enforcers, so the form that it will take when it is ultimately adopted remains to be seen.

Legal Challenge

In the meantime, in October 2019, the California Chamber of Commerce (CalChamber) filed a legal challenge to the Prop. 65 cancer warning requirement for acrylamide in food, alleging that imposing such a warning requirement violates the First Amendment.

CalChamber alleges scientific studies show that exposures to acrylamide in food do not increase the risk of cancer. Thus, requiring cancer warnings for acrylamide violates the First Amendment by compelling false and misleading speech. The case has survived several motions to dismiss, and the court's ruling on CalChamber's motion for a preliminary injunction and a defendant's motion for summary judgment are pending.

Lead and Cadmium Continue to be Targeted

Although it may have been outpaced for the first time by acrylamide notices and lawsuits, lead continued to be targeted by private enforcers, who served 60-day notices alleging exposure to lead in everything from molasses and seaweed, to spinach and spices, to drink mixes and dietary supplements. Many of the same products were also alleged to cause exposure to cadmium.

CBD, Hemp and Cannabis Products Likely Targets for THC

The California Proposition 65 warning requirement for THC took effect on January 3, making cannabis, hemp and CBD products a likely target for private enforcement actions.

Although under federal law CBD products are allowed to contain up to .3 percent THC, or Δ9-Tetrahydrocannabinol, no safe harbor level of exposure to THC has been established under Prop. 65. That means private enforcers can argue that any detectable amount can subject a product to the Prop. 65 warning requirement. Companies can seek to develop a safe use determination for THC, but until it is established and accepted by OEHHA, enforcement actions will be a material risk. Notably, the Prop. 65 listing applies to Δ9-THC, although the Prop.65 requirements may still be triggered by residual Δ9-THC present in other THC products, like Δ8-THC distillates.

At the same time that THC was added to the Prop. 65 list, OEHHA added a reproductive harm endpoint for cannabis (marijuana) smoke, which was already identified as a carcinogen under Prop. 65. That means that although cannabis products intended to be smoked may already bear a Prop. 65 warning related to cancer, the reproductive harm warning should also be included.

As for THC, the listing raises Prop. 65 considerations for a much broader range of cannabis, hemp and CBD products, such as oils, edibles, beverages, and vape cartridges. Plaintiff groups are expected to aggressively target these products, expanding on a multi-year trend of pursuing marijuana-based businesses for Prop. 65 violations.

“Although it may have been outpaced for the first time by acrylamide notices and lawsuits, lead continued to be targeted by private enforcers, who served 60-day notices alleging exposure to lead in everything from molasses and seaweed, to spinach and spices, to drink mixes and dietary supplements. Many of the same products were also alleged to cause exposure to cadmium.”

Chlorpyrifos Banned; Limits Set on Other Pesticides

Beginning in early 2020, California banned the sale of the pesticide chlorpyrifos, which state environmental officials say has been linked to brain damage and other health defects in children. Although the ban was not the result of a Prop. 65 action, chlorpyrifos is listed under Prop. 65 as both a carcinogen and a reproductive toxicant.

Under an agreement reached with the maker of chlorpyrifos, sales of the pesticide ended Feb. 6, 2020, and growers were not allowed to possess or use the chemical after Dec. 31, 2020. Chlorpyrifos is used primarily on crops such as alfalfa, almonds, citrus, cotton, grapes and walnuts. California environmental regulators have designated chlorpyrifos as "a toxic air contaminant" that poses health threats when inhaled or exposed to the skin of bystanders. The agreement includes a ban an aerial spraying.

Although it may be a moot point following the ban, on July 8, OEHHA approved a safe harbor level for chlorpyrifos of 0.58 micrograms per day through oral and inhalation exposure, and 7.2 micrograms per day for dermal exposure. Exposure below these safe harbor levels does not require a Prop. 65 warning.

OEHHA also established safe harbor levels this past year for three fungicides – chlorothalonil (41 µg/day); captan (300 µg/day); and folpet (200 µg/day). OEHHA also issued a safe use determination for chlorothalonil exposures resulting from consumption of residues in more than 60 foods. Foods causing exposures below the safe harbor level or containing chemical residues below the safe use determination do not require a warning.

Proposed Changes to Short-Form Warning

OEHHA has proposed significant changes to the regulations governing "short form" warnings that appear on numerous consumer products.

When OEHHA issued the warning regulations that took effect in August 2018, it provided an option for a short form warning, intending that it be used on products too small to accommodate the longer warning.

Frustrated that the short form warning has appeared on product packaging the size of refrigerator boxes, on January 8, 20201, OEHHA proposed a regulation that provides that the warning can only be used where the following three conditions are met:

- The total surface area of the packaging is five square inches or less;
- The package shape or size cannot accommodate the full-length warning; and
- The warning is printed in a type size no smaller than the largest type size used for other consumer information, but in no case smaller than 6-point type.

The proposed regulation clarifies a point of debate by confirming that the short form can be used on food products – so long as it's set apart in a box just like the long form warning.

OEHHA is also proposing to eliminate the option to use the short form for Internet and catalog warnings. Currently, the short-form warning can be used online and in catalogs if used on the product packaging. OEHHA proposes to change that, and would require the longer version online and in catalogs even where the short form is used on the product itself.

Perhaps the most significant change is the requirement that the short form warning include at least one chemical for each endpoint. Under the current regulations, the short form warning does not have to list any chemical for which the warning is being provided. The proposed regulation would change that, by requiring that the short-form warning include at least one chemical for which the warning is being provided, in the following form:

⚠ **WARNING:** Cancer Risk From [CHEMICAL] Exposure - www.P65Warnings.ca.gov

⚠ **WARNING:** Risk of Reproductive Harm From [CHEMICAL] Exposure - www.P65Warnings.ca.gov

⚠ **WARNING:** Risk of Cancer and Reproductive Harm From [CHEMICAL] Exposure - www.P65Warnings.ca.gov

OEHHA is accepting public comment on the proposed regulation through March 8, and proposes that the final version take effect one year after adoption.

NOTABLE TRIALS, RULINGS, AND SETTLEMENTS

Unsurprisingly, 2020 saw multiple COVID-19 filings in the food, beverage, and supplement space and few notable trials.

Although plaintiffs' counsel forge ahead in filing class action lawsuits under state consumer protection laws for allegedly mislabeled or misrepresented food, beverage and supplements products, some decisions in 2020 provided producers relief in federal district and appellate courts where the alleged consumer claims under state law were held to be preempted by federal laws including the Nutritional Labeling and Education Act, the Food, Drug, and Cosmetics Act, the Federal Meat Inspection Act, and other accompanying regulations.

Because of the reduced number of trials due to court closures from the pandemic, this section focuses on key decisions at the pleading dismissal, summary judgment, and settlement stages.

Key Rulings:

FOOD

- In *United Farm Workers of America, et al. v. Foster Poultry Farms*, case no. 20CV-03605, a California state court judge in the county of Merced issued a temporary restraining order against a meat-packing plant. The plaintiffs, employees of defendant Foster Farms, alleged that the poultry processor was not complying with COVID-19 safety protocols issued by county health regulators after another company facility saw a 400-person outbreak of the COVID-19 virus which led to nine deaths. Defendant argued that the infection rate had dropped to lower than 1% and, thus, a TRO was not necessary. During the hearing, the California judge emphasized the protocols' importance to the safety of the county's citizens, residents, and people that work in the community. The TRO requires the workers to wear face coverings, socially distance, follow certain hygiene protocols, institute health screenings for visitors, and follow other safety protocols.
- *Bell, et al. v. Albertson Companies Inc., et al.*, case no. 19-2741, and Bell et al v. Publix Super Markets Inc. et al., case no. 19-2581. This MDL transferred numerous similar actions to the Northern District of Illinois for consolidated pretrial proceedings, and the district court dismissed deceptive labeling claims arising under fourteen state consumer protection claims. A two-judge panel for the Seventh Circuit overturned the district court's dismissal of three of the consumer protection claims, reviving the theory that consumers would be misled by cheese claiming to be "100% Grated Parmesan Cheese" even though the ingredient list shows that the cheese contains other ingredients. The Seventh Circuit held that ordinary consumers are not obligated to parse through the labels, specifically on low cost products, and concluded that if reasonable consumers may interpret the labels differently, the question should be resolved by a fact-finder and not on a motion to dismiss.
- *Silva et al. v. Hornell Brewing Co.*, case no. 1:20-cv-00756. In the U.S. District Court for the Eastern District of New York, Plaintiff alleged that defendants violated 38 state consumer protection statutes by falsely labelling fruit snacks as all natural even though the products included synthetic ingredients such as gelatin, citric acid, ascorbic acid, glucose syrup, and modified corn starch. The court refused to dismiss all but two claims and denied defendant's motion to stay the case until the FDA issues regulations or a definition for "all natural," finding there is no evidence the FDA will make that decision any time soon.

"Unsurprisingly, 2020 saw multiple COVID-19 filings in the food, beverage, and supplement space and few notable trials."

- *Clark v. Perfect Bar, LLC*, case no. 19-15042. In the U.S. District Court for the Northern District of California, Plaintiffs alleged that Perfect Bars, a refrigerated protein bar, were mislabeled as healthy under the California consumer protection laws because the sugar content made the product unhealthy. The Ninth Circuit agreed with the lower court that the claims were preempted by the Nutritional Labeling and Education Act, the Food, Drug, and Cosmetics Act, and accompanying regulations.
- *AgroFresh Inc. v. Essentiv LLC, et al.*, case no. 1:16-cv-00662. In the U.S. District Court for the District of Delaware, a jury awarded the plaintiffs damages for defendant's willful and malicious stealing of trade secrets that allowed defendant to develop a product that delayed fruit ripening and allowed it to compete with plaintiffs' product. Although the court tossed a patent infringement claim and reduced the jury's damages award on the trade secrets claim by $18 million, it still granted plaintiffs $1 million in compensatory damages and $6 million in punitive damages.
- *Dunkin' Brands Inc.*, case no. 18-3087. The Second Circuit affirmed the lower court's dismissal of a putative class action in which plaintiffs alleged that defendant misled consumers about cuts of meat. The plaintiffs argued that marketing a product as "Angus Steak" when it is actually ground beef patties is misleading because the product is not an "intact" meat product. The court of appeals affirmed the dismissal on jurisdictional grounds as well as substantive grounds. Plaintiffs' arguments hinged on three television advertisements that allegedly were deceptive because they used the word steak when in reality the product was a beef patty. The court relied on a dictionary definition to hold that steak simply means a slice of meat or ground beef prepared for cooking or for serving as steak, e.g. Salisbury steak. While accurate statements may be misleading, under consumer protection laws, the products here were marketed as "grab-and-go" products and a reasonable consumer would not be misled to believe the product is a single piece of meat.

BEVERAGE

- *Tran v. Sioux Honey Association, Cooperative*, case no. 8:17-cv-00110-JLS-SS. In the U.S. District Court for the Southern District of California, Defendant, the Cooperative, filed a summary judgment motion asking the court to dismiss the plaintiff's consumer protection class action concerning alleged misrepresentations and omissions regarding the Cooperative's honey products. Plaintiff alleged defendants violated the California Legal Remedies Act, the California False Advertising Law, and the California Unfair Competition Law because the Cooperative labeled its honey as "Pure" and "100% Pure." She claimed that she purchased the product believing that the products only contained honey and no other chemicals or impurities. Defendant argued that courts have routinely rejected the notion that a product is not pure merely because it includes trace amounts of product, even if that product is alleged to have harmful tendencies. The court agreed and granted the Cooperative's motion for summary judgment.
- *Clark v. Westbrae Natural, Inc.*, case no. 20-cv-03221-JSC. In the U.S. District Court for the Northern District of California, Plaintiff alleged that Westbrae Natural, Inc.'s use of the word "vanilla" on its organic unsweetened vanilla soymilk misrepresents to consumers that the vanilla flavor is derived only from the vanilla bean plant. Plaintiff claimed that he interpreted the label as conveying that the product's vanilla flavor comes only from vanilla bean and not from vanilla substitutes, such as vanillin. An August 2020 survey of consumers reflected that nearly 70% of consumers believed the same. The court did not believe the surveys provided sufficient evidence to show a reasonable person would be deceived by the representation that the soymilk is vanilla. The court dismissed the complaint under the California Unfair Competition Laws and California's Consumer Legal Remedies Act.

SUPPLEMENTS

- In *Greenberg v. Target Corp.*, case no. 17-cv-01862-RS, the Ninth Circuit affirmed the district court's grant of summary judgment for Target in a case alleging that labeling of biotin supplements as "helps support healthy hair and skin" was false and misleading. Relying on its prior decision in *Dachauer v. NBTY, Inc.*, case no. 17-16242, the Court held that plaintiff's claims were preempted by the Food, Drug & Cosmetics Act, 21 U.S.C. §§ 343(r)(6), 343-1(a)(5). Target met the Act's requirements by having substantiation for the structure/function claim, and including a statement that the product "is not intended to diagnose, treat, cure, or prevent any disease." 21 U.S.C. § 343(r)(6). Plaintiff's attempt to impose an additional requirement that the product benefit a substantial segment of the population was therefore preempted.

Class Certification:

- In *Freedline v. O Organics LLC et al.*, case no. 3:19-cv-01945, the U.S. District Court for the Northern District of California struck down a possible nationwide class claim arising under California consumer protection statutes, Consumer Legal Remedies Act (Cal. Civ. Code § 1750 et seq.), Unfair Competition Law (Business & Professions Code § 17200 et seq.), and False Advertising Law (Business & Professions Code § 17500 et seq.), based on allegations that Defendants falsely advertised and misled consumers about the alcohol and sugar content within O Organics LLC kombucha beverage products. The court refused to certify a class asserting California consumer protection claims on behalf of non-California plaintiffs in a nationwide class because states have their own interests in having their own consumer protection laws applied to their own residents.
- *In re: Coca-Cola Products Marketing and Sales Practices Litigation* (No. II), case no. 4:14-md-02555. The U.S. District Court for the Northern District of California granted class certification of plaintiffs' allegations that Coca Cola misleads consumers about what added preservatives and artificial flavors are in its Coke products. The class claimants are residents of six different states, including California, Florida, Illinois, Massachusetts, New Jersey and New Jersey. The judge emphasized the fact that there are clearly common issues of fact, specifically whether it is misleading to consumers that Coke uses phosphoric acid in its drink product, and the proof of whether phosphoric acid is an artificial flavor is common to the class.

Key Settlements:

FOOD

- One case to keep an eye on is *In Re Broiler Chicken*, case no. 1:16-cv-08637, in the United States District Court for the Northern District of Illinois, in which class action claimants allege that since 2008, poultry producers engaged in a price fixing scheme resulting in violations of antitrust laws. In September 2020, three of the poultry producers agreed to a settlement of more than $13 million to resolve the antitrust claims against them. This action has seen an increase in publicity as the Department of Justice indicted 10 executives for the poultry producers. Even if the settlement is approved, there are a large number of defendants that remain in the case.

SUPPLEMENTS

- In *Sonner v. Schwabe North America Inc.*, U.S. District Court for the Central District of California, case no. 5:15-cv-01358, plaintiffs alleged that the defendants' claims that their gingko biloba pills increase "mental sharpness" lacked credibility based on scientific evidence. The class action was originally dismissed and went up on appeal to the Ninth Circuit. The Ninth Circuit reversed and remanded the case. A California class was certified in 2019. Defendants moved to dismiss the action because the California class's claims lacked the amount in controversy necessary to satisfy diversity under the Class Action Fairness Act. The court allowed damages to be calculated at the nationwide class level even though the nationwide class was not certified. The parties then agreed to a settlement of approximately $3.4 million.

WHAT'S TO COME IN 2021

As we move into 2021, we are already seeing some trends emerge in the world of food, beverage and supplement litigation. We expect the following areas to dominate the field in the coming year.

COVID-19 Regulation Rollbacks. As discussed above, the FDA issued wide-ranging regulatory rollbacks to provide temporary flexibility to food labeling and packaging laws. Many of these laws contain sunset provisions and will expire during the course of 2021. Manufacturers and restauranteurs that have enjoyed the relaxed regulatory environment will have to change course once the rollbacks cease and the FDA begins enforcing stricter requirements.

New theories in a new venue. While California remains an attractive venue for litigation in the food space, Wisconsin is becoming an increasingly popular filing destination. We expect Wisconsin to be a training ground for novel theories of liability that could challenge established precedent.

CBD Litigation. As discussed above, 2020 saw more than twenty new putative class action claims filed against CBD companies in California, Florida, Illinois and Massachusetts. We continue to monitor the theories argued by plaintiffs and the results obtained in these matters.

Challenges to "All Natural." The FDA indicated almost five years ago, in 2016, that it would issue a new definition of "natural" in human food labeling. As we reported last year, another year has gone by without the FDA providing a formal definition of "natural." As a result, consumer lawsuits challenging "natural" labels seem to have no end in sight. We remain on the watch for any renewed commitments to provide clarity to such suits.

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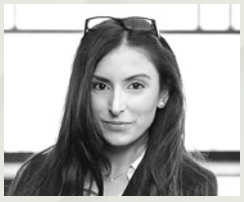

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